Supreme Court, U.S.
FILED
SEP 17 2004
OFFICE OF THE CLERK

No: 04 387

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

JAMES MORRISON,

Petitioner,
vs.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of West Virginia

PETITION FOR WRIT OF CERTIORARI

Mark T. Coulter, Esquire, Counsel of Record
Sharon A. Gould, Esquire
Peirce, Raimond & Coulter
2500 Gulf Tower
707 Grant Street
Pittsburgh, PA 15219
(412) 281-7229
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether, under the Federal Employers' Liability Act, the Court below erred in giving a common-law "proximate" cause jury instruction, requiring plaintiff to prove that defendant's negligence was a cause "without which plaintiff's injury would not have occurred" rather than confining its description of causation to this Court's Rogers' test of "in whole or in part, even in the slightest".
2. Whether the trial court erred in giving the jury an instruction on apportionment among multiple causes in an F.E.L.A. case where there was no competent evidence to support any jury finding apportioning plaintiff's indivisible mental injury among the causes described by the medical experts.

LIST OF PARTIES
TO THE PROCEEDINGS BELOW

James F. Morrison was the plaintiff below, the petitioner to the West Virginia Supreme Court and the PETITIONER herein.

CSX Transportation, Inc. was the defendant below, the respondent to the West Virginia Supreme Court and the RESPONDENT herein.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

LIST OF PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....vi

JURISDICTION.....vi

STATUTORY PROVISIONS INVOLVED.....vi

STATEMENT.....1

REASONS FOR GRANTING THE PETITION.....5

I. The trial court's decision conflicts with the decisions of federal and state courts on a recurring and important issue of F.E.L.A. liability

A. The trial court erred in giving a common-law proximate cause jury instruction in a Federal Employers' Liability Act (F.E.L.A.) case, wherein proximate cause is not the legal standard, because causation in an F.E.L.A. case need only be demonstrated "in whole or in part, even in the slightest".

B. The trial court erred in giving the jury an instruction on apportionment as there was no competent evidence to support any jury

finding apportioning plaintiff's indivisible mental injury among the causes described by the medical experts.

C. The charges assigned as error above, taken as a collective whole, were prejudicially erroneous in that they could readily lead the jury to the improper legal understanding that if causes other than the defendant's negligence played a greater part in causing plaintiff's injury, plaintiff could not recover, which is contrary to binding F.E.L.A. precedent that the plaintiff can recover for his injury if the defendant's negligence played any part, "even in the slightest", in causing his harm.

CONCLUSION.....16

TABLE OF AUTHORITIES

CASES

Coray v. Southern Pacific Company
335 U.S. 520 (1949) 5,6

Crookham v. New York Central Railroad Company
144 W.Va. 196, 107 S.E.2d 516 6,7

Gaulden v. Burlington Northern, Inc.
654 P.2d 383, 391(D. Kan. 1983) 14

Norfolk & Western Railway v. Ayers
538 U.S. 135 (2003) 12

Page v. St. Louis Southwestern Railway Company
312 F. 2d 84 (5th Cir. 1963) 7,8,9

Rogers v. Missouri Pacific RR
352 U.S. 500 (1957) 5,9,10,13

Stevens v. Bangor and Ardostook Railroad
97 F. 3d 594 (1st Cir. 1996) 11,12

STATUTES AND RULES

28 U.S.C. §1257(a) vi

45 U.S.C. §51.....vi,12

45 U.S.C. §53 .....vi,10

OPINIONS BELOW

The Order Denying a New Trial and Denial of Petition for Appeal are both non-reported opinions and are attached at Appendix A and Appendix B respectively.

JURISDICTION

The Order denying the petition for appeal was entered on July 24, 2004. Appendix B. The jurisdiction of this Court is invoked under 28 USC §1257 (a)

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Employers' Liability Act, 45 U.S.C. §51 and §53, are reproduced at Appendix C and Appendix D respectively.

STATEMENT

James F. Morrison respectfully petitions for a Writ of Certiorari to review the judgement of the Circuit Court of Ohio County, West Virginia in this case. This Statement is based on the facts as presented to the jury and on which the jury based its finding.

Plaintiff initially filed his complaint alleging damages in the nature of cognitive impairment under the Federal Employers' Liability Act as a result of hazardous exposure to liquid and gaseous toxic chemicals known as organic solvents used as degreasers while employed by the defendant, CSX Transportation Inc. On Monday, December 8, 2003 the trial began.

Plaintiff's physician, Alan Ducatman, M.D. from West Virginia University, testified via videotape deposition that solvents as well as hypertension, borderline diabetes and smoking caused or contributed to Mr. Morrison's problems. [Appendix E-1] Dr. Ducatman testified that he was unable to quantify or apportion the damages between the various causes beyond stating that the toxic solvents were plaintiff's most significant of the risk factor. [Appendix E-1] When specifically asked whether he could divide or apportion Plaintiff's injuries among the various contributing causes, he stated: "There is no science that permits us to do that for this. There aren't even good models. That doesn't preclude us from winging an unfounded opinion, but there is no science behind that opinion." [Appendix E-2]

Plaintiff's neuropsychologist, Dr. Marc Haut, stated his opinion that the plaintiff had permanent changes to his brain as a result of his exposure to solvents. [Appendix F]. At no point during his direct or cross-examination did Dr. Haut apportion any of the cognitive impairments between various causes. He

subsequently agreed that his opinion does not differ from that of Dr. Ducatman with respect to other causative factors. [Appendix F]

Defendant's medical testimony through its Rule 35 examiners, James Albers, M.D. and Stanley Berent, Ph.D., did not address apportionment in any way because CSX's doctors did not find that Mr. Morrison suffered from any impairments that would have been related to solvent exposure. Dr. Albers testified that the plaintiff exhibited "normal neurologic examination with regard to memory and concentration" [Appendix G]; and, that he experienced "normal memory variation" [Appendix G]. Dr. Albers' ultimate conclusion was that he could not "attribute any of the complaints or symptoms or findings that he has to prior occupational exposure to solvents of any type used in his work". [Appendix G]. The doctor expressed his opinion on alternate causation by stating that the problems "are very real, but they're related to anxiety. They're not related to solvents". [Appendix G].

Dr. Stanley Berent, the defendant's expert in neuropsychology, likewise testified that the problems were not related to solvent exposure. Dr. Berent's ultimate conclusion was that the plaintiff was "functioning essentially normally from a cognitive neuropsychological viewpoint" [Appendix H] and that "the results are not consistent with damage from exposure to toxicants." [Appendix H] Thus, defendant's medical testimony was that its conduct played no part in plaintiff's injury, and plaintiff's testimony was that it played a part along with other factors.

Following the testimony the Court charged the jury on common law proximate cause and on apportionment of cause over plaintiff's objections. The specific language of the trial court in its jury instructions at issue on this appeal is as follows:

> The proximate cause of an event is a negligent act contributing to the injury and without which the injury would not have occurred. The proximate cause of an event is that cause which, in natural and continuous sequence, unbroken by any independent cause, produces an event and without which the injury would not have occurred. (Judge's Charge to the Jury at Page 12)

And

> Should you determine that the Plaintiff's condition is due in part, no matter how large or small, to any other cause than the Defendant's negligence, you must calculate the portion or percentage of the Plaintiff's condition that was not caused by the Defendant's negligence. (Judge's Charge to the Jury at Page 21)

Plaintiff's objections to the jury instructions included that it was error to charge the jury on matters of proximate cause and apportionment among work related and non work related causes of a single indivisible harm under the law of the F.E.L.A. The trial court judge overruled the objections and preserved them. [Appendix I-1 and I-2] At approximately 5:50 p.m. the jury returned a unanimous verdict form as follows:

1. Question #1 "Do you find that the claim of James F. Morrison was timely filed on April 11, 2001?" Answer: "Yes."
2. Question #2 "Was there negligence on the part of CSX Transportation, Inc.?" Answer: "Yes."
1. Question #3 "Did the negligence of CSX Transportation, Inc cause, in whole or in part, the injuries sustained by James F. Morrison?" Answer: "No" and, thus, rendered a verdict in favor of Defendant CSX Transportation, Inc.

Judgment was entered on January 9, 2004. Plaintiff filed a timely Motion for a New Trial. An Order Denying the Motion for New Trial was entered on January 27, 2004. The Supreme Court of West Virginia denied review on June 24, 2004 with Justice McGraw voting in dissent to grant review.

These incorrect jury instructions relating to the issues of causation and apportionment of cause, as discussed below, were prejudicial to the Plaintiff. The jury found the defendant negligent, but did not find in Plaintiff's favor on the issue of causation.

REASONS FOR GRANTING THE PETITION

The inclusion of instructions regarding common law proximate cause and apportionment was so prejudicially erroneous as to necessitate review.

A. References to Proximate Cause Should Have Been Eliminated.

The test for causation under the Federal Employers' Liability Act requires only that the defendant's conduct was a cause "in whole or in part, even in the slightest" of the plaintiff's damages. *Rogers v. Missouri Pacific RR*, 352 U.S. 500 (1957). In light of this elimination of the common law notion of proximate cause, the separate inclusion of language injecting traditional common law proximate causation is incorrect.

This common law definition of proximate cause has been deemed to be inappropriate in F.E.L.A. cases by this Court since before its decision in *Rogers v. Missouri Pacific*. The matter was addressed specifically by this Court in *Coray v. Southern Pacific Company*, 335 U.S. 520 (1949), wherein this Court reversed the Utah Supreme Court's affirmation of a directed verdict in favor of the defendant, stating:

> "The Utah Supreme Court reviewed the evidence here and held as a matter of law that the defective equipment did not proximately cause or contribute to the decedent's death. The Court discussed distinctions between 'proximate cause' in the legal sense, deemed a sufficient cause to impose liability, and 'cause' in the

> 'philosophic sense', deemed insufficient to impose liability. It considered the stopping of this train to have been a cause of decedent's death in the 'philosophic sense' in that the stopping created a 'condition upon which the negligence of the plaintiff's intestate operated,' one perhaps of many causes 'so insignificant that no ordinary mind would think of them as causes.' The Court added, however, that the stopping 'was not the legal cause of the result,' thereby classifying it as 'not a substantial factor as well as actual factor in bringing about' the decedent's death' . . . The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectic subtleties can serve no useful interpretive purpose. The statute declares that railroads shall be responsible for their employee's death 'resulting in whole or in part' from defective appliances such as were here maintained."

Coray, 335 U.S. at 523.

In addition, the West Virginia courts have recognized inapplicability of proximate cause since 1959. *Crookham v. New York Central Railroad Company*, 144 W.Va. 196, 107 S.E.2d 516 (1959). While the court therein used the phrase "proximate cause" to describe the concept of legal cause, it carefully pointed out the extension of legal cause under

the F.E.L.A. and the abandonment of traditional proximate cause formulations in these cases:

> The language quoted leaves no doubt in the usual case at least, as to when the question of negligence of an employer-defendant under the Act becomes a question for jury determination. Though negligence of an employer constitutes only the 'slightest' part in producing the injury, and though the proof establish that the injury may probably have resulted from causes other than negligence of the employer, the question remains one for jury determination if the 'proofs justify within reason the conclusion that the employer negligence played an part, even the slightest, in producing the injury.' The commonlaw theory of proximate cause, like contributory negligence, and like assumption of the risk doctrine, is not to be applied in cases prosecuted under the Act in the manner of its application under common law.

Id. at 203-204.

Similar language was addressed by the Fifth Circuit Court of Appeals in *Page v. St. Louis Southwestern Railway Company*, 312 F. 2d 84 (5th Cir. 1963), wherein the court had charged the jury, in a fashion nearly identical to the trial court herein as follows:

> The term 'proximate cause' as used in this charge has a definite legal meaning which may differ from your understanding of the meaning of that term as used in ordinary parlance. As used in this charge, the term 'proximate cause' means that cause which in a natural and continuous sequence produced the event or happening in question and without which such event or happening would not have occurred; and the act or omission in question only becomes a proximate cause of an event or happening when such event or happening is the natural and probable consequence of such act or omission . . .

Id. at 87. The Fifth Circuit Court of Appeals reversed on this basis, stating:

> Under the definition of proximate cause in this case, the jury was required to find, before the plaintiff could prevail, that the cause of his injury was one which in natural and continuous sequence produced the event or happening in question, and without which such event or happening would not have occurred. A detailed consideration of those requirements would seem to indicate that they are not essential to the jury's conclusion in this case that employer negligence played a part in producing the plaintiff's injury. The same thing

> would appear to be true of the requirement that the accident be the natural and probable consequence of defendant's act or omission and such a consequence as ought to have been foreseen by a person in the exercise of ordinary care in light of attending circumstances. Those requirements may well have been injurious to the plaintiff. They are foreign to the simple test prescribed in *Rogers, supra.* Under that decision, and the long line of Supreme Court cases which have followed, we must hold that the court's instructions on proximate causation were erroneous in operating to unduly restrict the jury in the exercise of its function.

Id. at 92.

Nothing suggests that the rule of exclusion of the common law proximate cause instruction in F.E.L.A. cases has been changed. It is error to give a common law proximate cause charge to a jury in an F.E.L.A. case. A reasonable interpretation of the incorrect jury charge permits the jury, when deliberating, to find for the defendant on the critical issue of causation because they were instructed that they had to find that the proximate cause of plaintiff's injury was the defendant's negligence. This charge simply has no place in an F.E.L.A. suit, and prejudiced the plaintiff in the jury's deliberation. The existence of conflicting language in other parts of the charge to the jury with instruction comporting more closely to the *Rogers* standard does not fix this prejudicial error. Instructing the jury on two conflicting standard for determining legal cause requires them to choose one,

and the jury may choose the incorrect strict standard as likely as they might the correct liberal interpretation required under the F.E.L.A..

B. The Jury Should Not Have Been Given Any Instruction Regarding Apportionment of the Plaintiff's Indivisible Injury.

45 U.S.C. §53 [Appendix D] provides that when the employee's own negligence causes his injury, "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." Nowhere in the F.E.L.A. did Congress supplement this provision by stating that the plaintiff's damages for an indivisible injury would also be diminished by factors in the plaintiff's life not attributable to contributory negligence.

At page 21 of the charge, the Court instructed the jury to determine whether, and to what extent, to apportion plaintiff's injury to factors other than the defendant's negligence. Plaintiff's injury (cognitive impairment) is a single indivisible harm and is not rationally capable of apportionment, nor did the defendant provided any reasoned basis for an apportionment calculation to be made, such that this charge is improper. In an F.E.L.A. case: "Under the statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific RR*, 352 U.S. 500 (1957). With the above language, this Court established the course of development for the F.E.L.A. This broad, liberal reading of the concept of 'causation' found in the F.E.L.A. must shape and guide this Court's inquiry into whether a jury instruction

specifically asking a jury to 'apportion' the causes of the plaintiff's injury is appropriate. In an F.E.L.A. case, apportionment of an indivisible injury is impermissible. Further, because Mr. Morrison's injury is indivisible the trial court should not have permitted the jury to merely speculate regarding what the relative contribution of various non-work factors may be, even if the F.E.L.A. otherwise permitted apportionment when work was a cause of the harm.

F.E.L.A. and common tort law permit a plaintiff to recover his entire damages from a defendant whose negligence jointly causes indivisible personal injuries, such as a physical disease, while allowing the defendant to seek contribution from other tortfeasors. In *Stevens v. Bangor and Ardostook Railroad*, 97 F. 3d 594 (1st Cir. 1996), the Court of Appeals discussed this principle as applied to an F.E.L.A. case involving the effect of the railroad's aggravation of plaintiff's pre-existing back condition:

> "The Restatement provides some assistance in its discussion of apportionment of indivisible damages, explaining:
> Where two or more causes combine to produce such a single result, incapable of division on any logical or reasonable basis...the courts have refused to make arbitrary apportionment...and each of the causes is charged with responsibility for the entire harm. Restatement (Second) of Torts 443A(2) cmt. I, at 439 (1965).
>
> Thus a defendant gets the benefit of apportionment of harm only if 'there is

> a reasonable basis for determining the contribution of each cause to a single harm.' *Id.* At 434. If not, the defendant is liable for the whole. According to 443A, both the defendant's negligence and the plaintiff's pre-existing condition are deemed the cause of the entire harm, thus imposing the burden of the whole on both. But this tie is broken by the congressional intent to implement a policy benefiting the injured railway workers...We therefore think the better rule, particularly in light of F.E.L.A.'s broad remedial purposes, is that if the factfinder cannot separate injuries caused or exacerbated by the accident from those resulting from a pre-existing condition, then the defendant is liable for all such injuries."

Stevens, 97 F.3d at 598-99.

Similarly in a recent case, this Court, *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), specifically addressed apportionment. In that case the railroad was arguing that the trial court erred in instructing the jury "not to make a deduction [from damages awards] for the contribution of non-railroad [asbestos] exposures" to the asbestosis claimant's injuries. *Id.* at 159-160. In upholding the trial court's instruction, this Court stated that "the statutory language, however, supports the trial court's understanding that the F.E.L.A. does not authorize apportionment of damages between railroad and nonrailroad causes". *Id.*

In its liberal, remedial and humanitarian statutory scheme, the F.E.L.A. expressly imposes liability on the railroad so long as its negligence caused the plaintiff's injuries "in part." §45 U.S.C. §51. As repeatedly stressed by this Court, this statutory standard is met when the "employer negligence played any part, even the slightest, in producing the injury. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes." *Rogers*, 352 U.S. 506-07 (1957). In contrast to the F.E.L.A.'s adoption of comparative negligence, the F.E.L.A. does not provide that a plaintiff's recovery must be reduced because other innocent causes, such as hypertension, may have contributed to the plaintiff's indivisible injuries. Neither the common law in existence at the time of F.E.L.A.'s enactment nor the weight of common law authorities today dictate otherwise. The plaintiff's personal injury is a classic "indivisible" injury for which apportionment is not permitted.

Certainly, the threshold burden to establish that the plaintiff's condition was divisible would fall upon the defendant, along with the burden to provide proof of a reasonable basis for the jury to make the apportionment. Comparative fault unquestionably can not be a basis to apportion the harm in this case, as this principle, and the consequent reduction of a plaintiff's recovery, is already addressed in the comparative negligence portion of the F.E.L.A. and the apportionment permitted herein speaks to innocent contributions by the victim's medical history. Because the evidence in this case did not provide any basis for the jury to decide the relative weights or contributions of the non-work related factors to which it seeks to assign some unspecified portion of blame, the jury can not be permitted to speculate as to the apportionment. Such a scheme is simply neither specified nor

contemplated within the F.E.L.A. See, *e.g., Gaulden v. Burlington Northern, Inc.*, 654 P.2d 383, 391(D. Kan. 1983) ("bear all of the loss"). Indeed, the instruction given at the trial court was contrary to what Congress intended to eliminate when it rejected the assumption of risk and fellow servant rule defenses and thereby made railroad employers liable for injuries they caused "in part." The trial court had an obligation to prevent the jury from apportioning plaintiff's injuries among innocent causes.

C. Plaintiff was prejudiced by the trial court's contested instructions.

The instruction by the trial court that the jury must find "proximate causation" for the plaintiff to recover, coupled with the court's instruction to apportion plaintiff's harm to any other contributing causes which it might have found, worked to materially harm the plaintiff.

As noted above, the jury found that the defendant was negligent in its handling of the organic solvents in plaintiff's workplace. If the jury found that the defendant's negligence was any cause, even in the slightest, of plaintiff's condition, then plaintiff should have been entitled to recover for a unitary and indivisible injury. Instead, the trial court's instructions permitted the jury to find against the plaintiff due to the existence of other alleged causes of plaintiff's condition, such that the jury could have found that while the railroad's negligence played "a slight part" in causing plaintiff's condition, the existence of numerous other significant causes to which the trial court permitted apportionment prevented the finding that defendant's negligence was the "proximate cause" of plaintiff's injury, "without which the injury would not have occurred". This notion of proximate cause,

however, is antithetical to the F.E.L.A., such that these two instructions individually and working in tandem, materially prejudiced the plaintiff's ability to recover on the evidence submitted before the jury. Even assuming *arguendo* that Mr. Morrison's medical history was such that he would have suffered mental impairment without his negligently uncontrolled solvent exposures by CSX, if the solvent exposures played even a slight part in causing his condition then the F.E.L.A. mandates recovery be permitted. The prejudice of these two improper instructions provides an avenue for this liberal recovery scheme to be tainted on the issue of causation. The fact that the jury found an absence of "probable cause" demonstrates the prejudice of this error that can not be disregarded.

The mischief created by allowing erosion of the protection intended under the F.E.L.A. is dangerous indeed. The same principles of apportionment ceremoniously embraced by the trial court herein would permit a railroad to shift blame for a back injury to a pre-existing back condition which rendered a worker more susceptible to a negligently caused back injury or could allow the railroad to claim that its liability for a lung disease such as diesel exhaust induced cancer is somehow reduced because the plaintiff already had some cancer risks before his exposures at work. Such disintegration of the F.E.L.A. can not be countenanced, and this Court must act to protect this vital statutory scheme.

CONCLUSION

Petitioner requests that this Petition for Writ of Certiorari be granted by this Honorable Court to remedy this error and clarify this important issue for the trial court's handling of F.E.L.A. cases.

Respectfully submitted,
PEIRCE, RAIMOND & COULTER, P.C.

By: _____
MARK T. COULTER, ESQUIRE

By: Sharon A. Gould
SHARON A. GOULD, ESQUIRE

Attorneys for Petitioner

2500 Gulf Tower
707 Grant Street
Pittsburgh, PA 15219
(412) 281-7229